

MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

8/6/99

FROM: Michael A Pearson Executive Associate Commissioner /S/
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-
order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.¹ Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or release such an alien is made by the District Director. In the near future, the Service will begin the rulemaking process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The

¹ See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable, and April 30, 1999: Supplemental Detention Procedures.

next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful), and without Headquarters review, and a review with the opportunity for an interview at the alien's request and Headquarters review.

No case subject to a Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

- (1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order removal cases before the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.
- (2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1) – (3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F. R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

- (3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be considered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.
- (4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.
- (5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.
- (6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. See 8 C.F.R. § 241.4. The alien's failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. See INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.
- (7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to

detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

- (8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the preliminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will obtain concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.
- (9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.
- (10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.
- (11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

- (a) Notice to Alien
- (b) Notice of Interview
- (c) Detained Alien Custody Review Worksheet
- (d) Decision of Custody Review
- (e) Decision to Continue Detention
- (f) Decision to Release
- (g) Custody Review Status Report